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SERVICE DATE – SEPTEMBER 26, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.

v.

CSX TRANSPORTATION, INC.

Decided: September 25, 2013

This decision establishes a procedural schedule based on the Board's default schedule and denies the motion for procedural schedule filed by Total Petrochemicals & Refining USA, Inc. (TPI). TPI shall submit its opening rate reasonableness evidence by January 15, 2014. CSX Transportation, Inc. (CSXT) shall submit its reply rate reasonableness evidence by April 15, 2014. TPI shall submit its rebuttal rate reasonableness evidence by May 30, 2014. TPI and CSXT shall submit their final briefs by June 19, 2014. However, the parties may propose an alternative procedural schedule to which both parties have consented.

BACKGROUND

On May 3, 2010, TPI filed a complaint challenging the reasonableness of rates established by CSXT for the transportation of polypropylene, polystyrene, polyethylene, styrene, and base chemicals between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. TPI alleges that CSXT possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's Stand-Alone Cost (SAC) test.

On October 1, 2010, CSXT filed a motion for expedited determination of jurisdiction over the challenged rates (motion to bifurcate). CSXT argued that its service over 97 of the 120 lanes that were challenged in the first amended complaint were subject to effective competition from rail, truck, or rail-truck transportation alternatives, and, therefore, not subject to the Board's rate reasonableness jurisdiction. On October 21, 2010, TPI replied in opposition to the motion to bifurcate.

In Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc. (Bifurcation Decision), NOR 42121 (STB served Apr. 5, 2011), the Board determined that it was appropriate to bifurcate this proceeding into separate market dominance and rate reasonableness phases, holding the rate reasonableness portion of the proceeding in abeyance and postponing the submission and consideration of rate reasonableness. On May 31, 2013, the Board, with Vice Chairman Begeman dissenting, issued a decision determining the issue of market dominance for

each lane (Market Dominance Decision) and found that CSXT is market dominant over certain lanes, requiring the rate reasonableness phase to proceed.

TPI and CSXT filed petitions for reconsideration of the Market Dominance Decision on June 20, 2013.¹ On June 21, 2013, TPI filed a motion for an expedited decision on its third motion to compel and a motion for a procedural schedule. On July 1, 2013, CSXT filed a consolidated reply to the motions for an expedited decision and procedural schedule. On July 9, 2013, the parties participated in a discovery conference with Board staff. TPI filed a reply to CSXT's proposed procedural schedule on July 10, 2013.² On July 12, 2013, TPI filed a motion for partial dismissal of its third motion to compel, and CSXT filed a reply to the motion for partial dismissal. In a decision served on July 19, 2013 (Supplemental Discovery Decision), the Board, with Vice Chairman Begeman dissenting, addressed the third motion to compel and the motion for an expedited decision on the third motion to compel, and ordered CSXT to begin producing the supplemental discovery responses agreed to by the parties and to complete supplemental production no later than October 17, 2013.

DISCUSSION AND CONCLUSIONS

The parties have not agreed on issues related to a procedural schedule for the rate reasonableness phase of the proceeding. The parties disagree on whether the Board should allow final briefs.³ TPI argues that final briefs would unnecessarily extend the schedule in a case that has already taken three years and that any delays are prejudicial to TPI.⁴ TPI also claims that defendants have abused final briefs in recent cases.⁵ CSXT replies that TPI's proposal to eliminate final briefs is inequitable because, without final briefs, TPI would make two filings compared to one for CSXT, and because TPI would effectively have the opportunity to file a final brief as part of its rebuttal evidence.⁶ CSXT also argues that TPI's claim of abuse of final briefs in another proceeding mischaracterizes that defendant's final brief and that final briefs

¹ Replies to the petitions for reconsideration and other related motions have also been filed. The petitions and related motions will be addressed in a future decision.

² We will accept this filing in the interest of a complete record.

³ Motion for Procedural Schedule 7-9; CSXT Reply to Motion 7-11.

⁴ Motion for Procedural Schedule 7-10.

⁵ Id. at 7-8.

⁶ CSXT Reply to Motion 7-11.

provide defendants the opportunity to address “evidentiary excesses and distortions” in rebuttal filings.⁷

The parties disagree as to the amount of time CSXT should receive to file its reply evidence.⁸ TPI argues that 120 days for CSXT to file its reply evidence is sufficient because CSXT previously agreed to a similar schedule; TPI notes that under the previously agreed-to schedule, CSXT would have had to address market dominance in addition to rate reasonableness.⁹ TPI claims that while the procedural schedule can always be extended if necessary, it is unlikely that it would be shortened.¹⁰ CSXT proposes a 180-day period for preparation of reply evidence in light of the complexity of the case and recent experience in a similarly complex proceeding, in which the defendant received 214 days to prepare reply evidence.¹¹ CSXT also argues that TPI’s proposed schedule is inequitable because TPI would effectively receive 195 days to prepare its opening evidence (including the supplemental discovery period) while CSXT would only receive 120 days to prepare its reply evidence.¹² TPI replies that CSXT exaggerates the amount of time TPI will receive to file its opening evidence because it must receive, review, and organize the supplemental discovery evidence before it begins to develop its evidence.¹³ TPI also argues that in the proceeding where the defendant received 214 days to prepare its reply evidence, the defendant had to address both market dominance and rate reasonableness, unlike this proceeding where parties have already filed market dominance evidence.¹⁴

Finally, the parties disagree on the amount of time they should receive to file final briefs.¹⁵ TPI excludes final briefs from its proposed schedule.¹⁶ CSXT asserts that 60 days is appropriate, particularly in light of procedural schedules in other recent cases.¹⁷

⁷ Id. at 8-10.

⁸ Motion for Procedural Schedule 5-6; CSXT Reply to Motion 6-7.

⁹ Motion for Procedural Schedule 5-6.

¹⁰ Id. at 6 n.3.

¹¹ Reply to Motion for Procedural Schedule 6-7.

¹² Id. at 7.

¹³ TPI Reply to CSXT’s Proposed Procedural Schedule 3.

¹⁴ Id. at 2.

¹⁵ Motion for Procedural Schedule 2; CSXT Reply to Motion 11.

¹⁶ Motion for Procedural Schedule 2.

¹⁷ Reply to Motion for Procedural Schedule 11 & n.12.

With respect to the issue of final briefs, the Board generally finds final briefs informative to summarize arguments, expects that final briefs will be helpful in this case, and therefore will allow parties to file them. Consistent with recent decisions, final briefs will be limited to 60 pages, including exhibits. See, e.g., Intermountain Power Agency v. Union Pac. R.R., NOR 42136 (STB served July 17, 2013). Briefs, and exhibits to the extent possible, must be double spaced and use Times New Roman 12-point font or larger. Parties may not present new evidence in their briefs.

With respect to the issue of the procedural schedule, the Board has established a default schedule for rates proceedings. Seminole Elec. Coop., Inc. v. CSX Transp., Inc., NOR 42110, slip op. at 3 (STB served Dec. 11, 2008). Because the parties have not agreed to a procedural schedule, the Board will apply the default schedule here. The schedule will begin at the close of supplemental discovery on October 17, 2013.¹⁸ TPI shall submit its opening rate reasonableness evidence by January 15, 2014. CSXT shall submit its reply rate reasonableness evidence by April 15, 2014. TPI shall submit its rebuttal rate reasonableness evidence by May 30, 2014. TPI and CSXT shall submit their final briefs by June 19, 2014. However, the parties may propose an alternative procedural schedule to which both parties have consented.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TPI's motion for a procedural schedule is denied.
2. The procedural schedule for the rate reasonableness phase is as follows:
 - TPI's opening evidence is due by January 15, 2014.
 - CSXT's reply evidence is due by April 15, 2014.
 - TPI's rebuttal evidence is due by May 30, 2014.

¹⁸ In the Supplemental Discovery Decision, slip op. at 3-4, the Board addressed CSXT's argument that the rate reasonableness phase of the proceeding, starting with supplemental discovery, should not begin until the Board had decided the petitions for reconsideration. The Board explained that petitions for reconsideration do not automatically stay the effect of a prior action and that the rate reasonableness phase of the proceeding would go forward regardless of its decision on the petitions for reconsideration. The Board stated that the parties could begin to prepare their evidence for the rate reasonableness phase of the proceeding while it considers the petitions for reconsideration. Id. at 4. This decision establishing a procedural schedule is consistent with the Supplemental Discovery Decision.

Final briefs are due by June 19, 2014.

3. The parties are directed to prepare their closing briefs in this proceeding in the manner described above.
4. The parties may propose an alternative procedural schedule to which both parties have consented.
5. This decision is effective on its date of service.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings